Apply those rules to the present case, and it is clear that the findings are not sufficient to support the judgment, and that there should be a new venire, giving the defendants an opportunity to show, if they can, that the bonds were fraudulent in their inception, and the plaintiff an opportunity to show, if he can, that he paid value for the coupons at the time of the transfer.

THE SAPPHIRE.

1. A foreign sovereign can bring a civil suit in the courts of the United States.
2. A claim arising by virtue of being such sovereign (such as an injury to a public ship of war) is not defeated, nor does suit therefor abate, by a change in the person of the sovereign. Such change, if necessary, may be suggested on the record.
3. If an injury to any party could be shown to arise from a continuation of the proceedings after a change in the person of the sovereign, the court in its discretion would take order to prevent such a result.
4. If a vessel at anchor in a gale could avoid a collision threatened by another vessel and does not adopt the means for doing so, she is a participant in the wrong, and must divide the loss with the other vessel.

THIS was an appeal from the Circuit Court of the United States for the District of California.

The case was one of collision between the American ship Sapphire and the French transport Euryale, which took place in the harbor of San Francisco on the morning of December 22, 1867, by which the Euryale was considerably damaged. A libel was filed in the District Court two days afterwards, in the name of the *Emperor Napoleon III*, then Emperor of the French, as owner of the Euryale, against the Sapphire. The claimants filed an answer, alleging, among other things, that the damage was occasioned by the fault of the Euryale. Depositions were taken, and the court decreed in favor of the libellant, and awarded him $15,000, the total amount claimed. The claimants appealed to the Circuit Court, which affirmed the decree. They then, in July, 1869, appealed to this court. In the summer of 1870, Na-

poleon III was deposed. The case came on to be argued here February 16, 1871. Three questions were raised:

1. The right of the Emperor of France to have brought suit in our courts.

2. Whether, if rightly brought, the suit had not become abated by the deposition of the Emperor Napoleon III.

3. The question of merits; one of fact, and depending upon evidence stated towards the conclusion of the opinion (see *infra*, pp. 169, 170), where the point is considered.

Mr. C. B. Gooderich, for the appellant:

1. The sovereign of a country, the public rights or property of which have been destroyed, or injured, by a citizen of another country, cannot maintain suit against such citizen, in the judicial tribunals of the country to which such citizen belongs, to recover compensation for the injury. The remedy, and the only remedy, of the foreign sovereign is by diplomatic correspondence and arrangement between the two countries. The repose of nations, and their intercourse with each other, cannot be maintained, if sovereign rights are to be ascertained and adjudicated by a suit, in the name of the foreign sovereign, against a private citizen by whom they may have been violated.*

The case before the court illustrates the propriety of the principle and reason upon which the position is taken. The claimants cannot call upon Napoleon, to answer interrogatories, upon oath, under the admiralty rule which requires libellants to answer. The owners of the Sapphire, in their answer, *say that the collision was caused by the fault of the French transport.* Admitting this to be true, still they cannot obtain a warrant for the arrest of a vessel belonging to the navy of France,† and which is in our harbor in the charge of an officer of the French navy.

* Duke of Brunswick *v.* The King of Hanover, 6 Beavan, 1; S. C., 2 House of Lords Cases, N. S. 1; Hullet *v.* The King of Spain, 1 Dow & Clark, 169; S. C., 1 Clark & Finelley, 333; Prioleau *v.* United States and Andrew Johnson, Law Reports, 2 Equity Cases, 659.

† Brown *v.* Duchesne, 19 Howard, 183.

There should in every proceeding be a mutuality of remedy. In the case of specific performance, whenever from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being performed, against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.

The case of *Prioleau* v. *United States and Andrew Johnson*,* presents in its result difficulties attending a suit in the name of a foreign government, which can be surmounted only by holding that a foreign sovereign cannot maintain suit in the courts of another country, against its citizens, for the purpose of vindicating his sovereign rights. In the assertion of individual private rights he may have suit.

The cases cited say, that a foreign sovereign, by the institution of a suit, submits to the jurisdiction of the court divested of his sovereign rights; must answer to a cross-bill, upon oath; make discovery, or put some one forward, as party to the suit, who can. This shows that his sovereign rights cannot with propriety become the subject of a suit.

2. But supposing that the suit could yet be maintained if Napoleon III were now Emperor, it would seem certain that it cannot be continued, he being now deposed, and reduced to the state of a private person. The Euryale is a vessel of the French government; a government with which he has nothing whatever now to do; being banished and a fugitive.

3. [The counsel then discussed the question of fact.]

Mr. C. Cushing, contra (*a brief of Mr. Melton Andrews being submitted on the merits*), stated that suits had been maintained in Great Britain, in the name of the United States, within the last five years, in the following cases, he himself having been counsel in the same, namely: The Sumter (Admiralty), The Rappahannock (Admiralty), The Gibraltar (Admiralty), The Tallahassee (Admiralty), The Alexander (Admiralty),

* Law Reports, 2 Equity Cases, 659.

Prioleau (Chancery), Wagner (Chancery), Tait (Law), Gudgeon (Chancery), Blakely Company (Rolls), and in British America, in the case of Boyd and others (Chancery), and The Georgia (Admiralty).

Indeed the right of a government to sue in the courts of Great Britain is a right recognized from the time of Rolle's Abridgement (Temp. James I).*

The courts in England hold, indeed, that a sovereign cannot be forced into court by suit, and to that extent some of the cases cited on the other side go. But they admit that, if a foreign sovereign appears in court voluntarily as plaintiff, the defendant may then sue him by cross-bill or otherwise. That is not to deny his right to sue, but only to declare its consequences.

2. The right to sue having been in this case one in which the name of the late Emperor was used only as representing the government, survives his deposition. Substitution on the record of the name of any new government of France, is matter as of course.

3. [The counsel then discussed the question of fact.]

Mr. Justice BRADLEY delivered the opinion of the court.

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810.† The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign States*, citizens, or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing

* Title "Court de Admiralty," E. 3; S. C., 1 Rolle's Reports, 133.

† King of Spain *v.* Oliver, 2 Washington's Circuit Court, 431.

out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit.*

The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such enures to his successors in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the

* King of Spain *v.* Hullett, 1 Dow & Clarke, 169; S. C., 1 Clarke & Finelly, 333; S. C., 2 Bligh, N. S. 31; Emperor of Brazil, 6 Adolphus & Ellis, 801; Queen of Portugal, 7 Clarke & Finelly, 466; King of Spain, 4 Russell, 225; Emperor of Austria, 3 De Gex, Fisher & Jones, 174; King of Greece, 6 Dowling's Practice Cases, 12; S. C., 1 Jurist, 944; United States, Law Reports, 2 Equity Cases, 659; Ditto, 1b. 2 Chancery Appeals, 582; Duke of Brunswick *v.* King of Hanover, 6 Beavan, 1; S. C., 2 House of Lords Cases, 1; De Haber *v.* Queen of Portugal, 17 Q. B. 169; also 2 Phillimore's International Law, part vi, chap. i; 1 Daniel's Chancery Practice, chap. ii, § ii.

Statement of the case as respects merits, in the opinion.

real and substantial ownership of the Euryale has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

If a special case should arise in which it could be shown that injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result.

The remaining question relates to the merits of the case. And on the merits of the case, as presented by the record, we think that the court below erred in imposing the whole damage upon the Sapphire. We think that the Euryale was equally in fault, and that the damage ought to be divided between them. It is not our general practice to scrutinize very carefully the weight of evidence in cases of collision, where the evidence is substantially conflicting, and where both District and Circuit Courts have concurred in a decree upon the merits. Our views upon this subject will be found quite fully expressed by Mr. Justice Clifford in the case of *The Baltimore.** But this case depends upon a narrow point, the evidence on which is in our view so decidedly adverse to the sole liability of the Sapphire that it becomes our duty to notice it.

The Euryale came to anchor in the harbor on the 14th of December, about six hundred yards from the wharf. She was of four hundred and fifty tons burden, drew thirteen feet of water, and had out fifty-six fathoms of chain, and an anchor weighing 3500 pounds. The Sapphire, of thirteen hundred tons burden, came to anchor about the 18th of December, about three hundred yards (as alleged both in the libel and answer) to the southeasterly of the Euryale, at a point farther up the harbor, and farther from the wharf. She had out about fifty fathoms of chain, and an anchor weighing 3600 to 3800 pounds, and she was heavily laden, drawing about twenty-three feet of water.

* 8 Wallace, 382.

On the night of the 21st of December it commenced to blow pretty strong from the southeast, by midnight blowing a six-knot breeze, and it kept increasing up to the time of the collision at five o'clock the next morning, when it seems to have been blowing a gale. At half-past three in the morning the tide changed from ebb to flood, the direction of flood-tide being southeasterly, directly contrary to that of the wind. And the captain of the Euryale says (and he is not contradicted) that the wind was twice as strong as the tide. The weight of the evidence is that the Sapphire, under the force of the wind, dragged her anchor and got inside of the Euryale; that is, between her and the city. At a few minutes past five the collision occurred.

The libellant insists that the Sapphire was in fault in two points: 1st, in anchoring too near the Euryale in the first instance; 2d, in not having out sufficient anchors. We think that the first charge is not sustained. Experienced pilots testified that two hundred and fifty yards distance is a good and sufficient berth in that harbor. And it is to be noted that the master of the Euryale made no complaint of too great proximity, although she and the Sapphire were lying in the same relative position for several days. On the other point, we agree with the District and Circuit Courts that the Sapphire was in fault. Had a second anchor been put out at an earlier period the collision in all probability would not have occurred. Indeed, the captain of the Sapphire gave orders to the first officer that if she was likely to start, to put the second anchor down. But it was not done till the collision itself broke the ring-stopper and let it down. A more careful watch would have led to the discovery of the vessel's having started, and would have prevented the catastrophe which ensued.

But we are also satisfied that the Euryale was not free from fault. The captain was not on board. The first officer, though on board, was not on deck from eleven o'clock until after the collision. Le Noir, the third officer, was officer of the deck that night. He was called up by the head, or chief, of the watch at three o'clock to observe that the Sapphire

was approaching nearer to them than she had been. He attributed it to her letting out more chain, and returned below, and did not come on deck again until five o'clock, a few moments before the collision, when it was too late to avoid it. The instant he came on deck he ordered done the thing that could have saved them had it been done earlier—the jib to be hoisted. It would have sheered the vessel off, and allowed the Sapphire to pass her. Such is the testimony of the libellant's own witnesses. It is the judgment of the first officer of the ship. Why was not this done before? Why was not the officer, on such a night, in such a gale, at his post? At four o'clock the man in charge of the watch saw the Sapphire approaching, and says he made a report to that effect. The first officer says that no report was made to him. But the third officer, who was officer of the deck, does not say that it was not made to him. If the fact was not communicated to the proper officer, that was in itself a fault. If it was communicated and not attended to, the case of the libellant is not bettered. But the evidence is very strong that the officer received the information. Deveaux, the head of the watch, says that he reported the fact at four o'clock; and Bioux, who had charge of the watch between four and five o'clock, says that between those hours he saw the Sapphire with the wind astern, and heading the current, coming towards the Euryale; that she continued to approach gradually, and that he reported this to Mr. Le Noir between four and five o'clock. Here, then, was a clear neglect of proper precautions for an entire hour immediately preceding the collision.

We cannot avoid the conviction that there was a want of proper care and vigilance on the part of the officers of the Euryale, and that this contributed to produce the collision which ensued. Both parties being in fault, the damages ought to be equally divided between them.

Decree of the Circuit Court REVERSED, and the cause remitted to that court with directions to enter a decree

IN CONFORMITY WITH THIS OPINION.